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Supreme Court of the United States

OCTOBER TERM—1924.

No. 81.

In the Matter

of

The Petition of THE EAST RIVER TOWING CO., INC., for Limitation of its Liability as Owner of the Steamtug EDWARD, her engines, etc.

BRIEF FOR APPELLEE ON QUESTIONS CERTIFIED BY THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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The Petition of the EAST RIVER TOWING CO., INC., for limitation of its liability as owner of the steam tug "Edward," her engines, etc.

On a Certificate from the U. S. Circuit Court of Appeals of the Second Circuit.

BRIEF OF APPELLEE.

Statement.

The questions of law concerning which the Circuit Court of Appeals desires the instruction of this court involve a construction of Section 33 of the Merchant Marine Act of June 5th, 1920 in its relation to and effect upon the limited liability of ship owners in actions arising and being prosecuted under its provisions.

The decision of the District Court is reported below as The Edward, 294 Fed., 686.

The certificate is reported below as The Edward, 291 Fed., 1017.

Facts.

The decree of the United States District Court, Eastern District of New York, resulting in the certificate herein, vacated a stay of an action pending and ready for trial in the Supreme Court, of the State of New York, County of Kings, brought by the personal representative of Thomas McCaffrey, who died August 2nd, 1922, as a result of personal injuries received by the explosion of the boiler of the steam tug "Edward" of which he was captain.

The action was brought and was being prosecuted under Section 33 of the Merchant Marine Act of June 5th, 1920.

The action was commenced by the service of a summons and complaint on the defendant on or about the 2nd day of October, 1922, and issue was joined by the service of defendant's answer on or about October 18, 1922.

Thereafter a motion for preference was made by the plaintiff, the said motion was granted and said action set for trial as a preferred cause on December 11, 1922.

Thereafter and on or about December 5, 1922, the defendant procured from the United States District Court, Eastern District of New York, and served upon the plaintiff's attorney in the above mentioned action, an order restraining the further prosecution of the action aforesaid, that is, the action wherein Elizabeth McCaffrey as administratrix of Thomas McCaffrey, deceased, is plaintiff, and The East River Towing Co., Inc., is defendant, then pending in the Supreme Court of the State of New York for the County of Kings, and the institution and prosecution of any action of any nature or description whatsoever, except in

that proceeding, against the defendant in that action, in support of any claim arising out of or connected with the accident which occurred on August 2nd, 1922, wherein the steamtug "Edward" was sunk by an explosion in the East River off the foot of Gold Street, Brooklyn. Subsequently the usual monition, requiring the personal representative of said deceased seaman to appear in the said United States District Court on or before the time therein stated, to make due proof of her claim before a commissioner therein appointed to take such proofs, was served upon the attorney for the personal representative in said pending action. A motion was thereupon made in the District Court to vacate and set aside the said stay.

In support of the motion to vacate it was shown that the said action of Elizabeth McCaffrey, as administratrix, etc., of Thomas McCaffrey, deceased, was pending in the Supreme Court of the State of New York, in an action by the legal representative of a seaman for damages sustained by the next of kin of said seaman for the death of said seaman as a result of personal injury received in the course of his employment.

It was also shown that prior to the accident the defendant in said action and the petitioner herein had procured for the benefit of itself and for its employes insurance against loss and/or expenses arising or resulting from claims upon the insured for damages in consequence of any accident occurring to said employes while in the course of their employment not to exceed $25,000 in case of one person being injured, and not to exceed $100,000 for all persons injured in the same accident, and the said contract of insurance was in force at the time of the accident resulting in the death of plain-

tiff's intestate. The policy of insurance was informally produced in court and used upon the argument.

The appearance of the personal representative in this proceeding was made specially and her motion based upon the following specific grounds:

> "1st. The Act of 1851 and amendments thereto commonly known as the Limited Liability Law and the Rules in Admiralty adopted in pursuance thereof have no application to the cause of action set forth in the complaint of the plaintiff therein.
>
> 2nd. This court has no jurisdiction to restrain or in any way interfere with the prosecution of said action begun and pending in the Supreme Court of the State of New York for the cause of action set forth in the complaint therein.
>
> 3rd. That the petitioner herein is indemnified to the extent of $25,000 against loss by accident such as that set forth in the complaint in the said action and under the terms of the said policy of indemnity the insurance carrier is not released by the bankruptcy or insolvency of the assured and the liability therefor, in any event, is that of the insurance carrier and not of the petitioner herein."

The motion to vacate such stay was granted and a decree to that effect entered. Subsequently, by motion, the decree was resettled and from such resettled decree an appeal was taken to the Circuit Court of Appeals for the 2nd Circuit which court under the provisions of Section 239 of the Judicial Code asks instructions from this court.

QUESTIONS CERTIFIED.

(1) If an action at law be brought such as is described in Merchant Marine Act 1920, Sec. 33, can the prosecution thereof be enjoined by the injunction provided for in Admiralty Rule 51?

(2) Has the Merchant Marine Act 1920, Sec. 33, impliedly repealed the statute regarding limition of liability of ship owners so far as claims or suits based on personal injuries to or death of seamen are concerned?

In this brief they will be considered in their reverse order.

POINT I.

The limited liability acts have no application to cases brought under the Jones Act for personal injury resulting in death.

Appellee in the court below did not and does not now raise any question with respect to the validity of the Limited Liability Act or with the exclusive jurisdiction of admiralty in any case when such Limited Liability Act is applicable.

She did not then and does not now question the right of the District Court to restrain or stay the prosecution of and remove to itself any action where limited liability is applicable.

Neither did she contest nor dispute the right of petitioner herein to claim the benefit of said act in the pending proceeding for itself, as against damages to persons or property other than seamen in the course of their employment.

The whole scheme of Limited Liability is embodied in the Acts of Congress of 1851-1884 and 1886. In these Acts, however, the scheme is but sketched in outline and the regulation of details as to the form and modes of procedure was left to be prescribed by judicial authority. As was said by Mr. Justice Bradley in Providence and N. Y. S. S. Co. v. Hill Manufacturing Co., 199 U. S., 578-590:

> "It (the Act) laid down a few general principles and propositions and left it to the courts to enforce them and carry them into practical effect."

It was in pursuance of this judicial duty that the Rules in Admiralty regulating and prescribing the proceedings necessary to be taken to procure the benefit of limited liability were formulated.

It follows therefore that the policy of limited liability under the restrictive clauses contained in each of the Acts, such restrictions becoming a part and parcel of the policy, is that of Congress.

It also follows that if Congress has changed by addition or qualification the policy adopted three quarters of a century ago the judicial authority to enforce, by proper regulation, such changes, additions or qualifications may still be invoked and exercised.

Without burdening the court with citation or quotation it may be asserted that the history of the limited liability legislation and its judicial construction from its inception shows its purpose to have been to encourage the building of ships and the erection of a merchant marine that would comport with the dignity and importance of the Nation in the world of trade.

But also running through the policy of the law, at least since 1884, has been the protection of seamen and a safeguarding of their rights such as the exemption of seaman's wages and, from its inception, the exclusion, from the benefits of limitation, loss incurred with the privity and knowledge of the owner.

The limitations and qualifications particularly applicable to the pending proceeding, as appellee contends, are summarized in Richardson v. Harmon, 222 U. S., 96, and reiterated in Pendleton v. Brenner Line, 246 U. S., 353, and are such as leave the owner only "liable for his own fault, neglect and contracts."

The same thought is expressed in Liverpool and Great Western Steam Co. v. Phenix Ins. Co., 129 U. S., 397, where Mr. Justice Gray in commenting on a contract by a carrier not to be answerable for its own or its servants' negligence in reference to such carriage and repudiating it as being contrary to public policy said:

> "The only important modification by the Congress of the United States of the previously existing law on this subject is the Act of 1851 to limit the liability of ship owners (Act, March 3, 1851 & 43; 9 Stat. at L., 635 R. S., Sects. 4282-4289) and that act leaves them liable without limit for their own negligence, and liable to the extent of the ship and freight for the negligence or misconduct of the master and crew."

It will not of course, be disputed that prior to the enactment of Sec. 33 of the Merchant Marine Act of June 5, 1920, except for unseaworthiness, a seaman injured in the course of his employment

could recover only for maintenance wages and cure; if death ensued no right of action at all existed under the Admiralty Law in favor of his legal representatives.

The effect, however, of the above named act was to change all that and in plain language, to place seamen upon the same footing as railroad employees engaged in interstate commerce, both as to personal injuries and death as the result of such injuries. Now a seaman who suffers personal injury in the course of his employment may, at his election, maintain an action for damages at law with the right of trial by jury and all statutes modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury and in such case *all statutes* of the United States *conferring or regulating* the right of action for death in case of railway employees shall be applicable.

The instant case arises by reason of the death of a seaman and hence under that section a "case in which *all statutes* of the United States *conferring or regulating* the right of action for death in case of railway employees" applies.

Section 6, Chap. 149, 35 Stat. L. 65, 18 Fed. Stat. An., 2nd Ed., 1369, one of the statutes of the United States "regulating the right of action" for death in case of railway employees provides:

> "Sec. 6. * * * The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several states, and no case arising under

this act and brought in any State Court of competent jurisdiction shall be removed to any Court of the United States."

That the proceeding inaugurated by the appellant, when it filed the petition herein seeking to limit its liability under the Act of 1851, constituted a *removal of the action* from the Supreme Court, a state court, to the Admiralty Court, a federal court, cannot be denied.

> "The very nature of the proceeding is such that it must be exclusive of any separate suit against an owner on account of the ship. The monition which issues when the vessel has been surrendered and a stipulation entered into to pay the value into court, *requires every person to assert his claim in that case.*
>
> * * * * * * *
>
> In that situation, the jurisdiction of the court (the Court of Admiralty) to hear and determine *every claim in that proceeding became exclusive.* It was then the duty of every other court, federal or state, to stop all further proceedings in separate suits upon claims *to which the Limited Liability Act applies.*" (These italics are ours.)
>
> *Mt. Redwood Co.* v. *Dor,* 223 U. S., 365.

The state court is ousted of all jurisdiction, and the remedy sought therein must be pursued in the proceeding in the Admiralty Court.

Appellee's right to damages and the amount of damages, if any, to which she is entitled must be fixed and determined by a commissioner named by the Admiralty Court instead of, as Congress says,

"an action for damages at law with the right of trial by jury."

The power of the court to thus abrogate a valid and constitutional provision of the statute law of the land is respectfully challenged.

It has been held in the Southern District of New York (*Martin* v. *N. Y. R. Co.*, 241 Fed., 696), in numerous other district courts and the Circuit Court of Appeals of the Sixth Circuit (*Teel* v. *Chesapeake R. Co.*, 204 Fed., 918), that the section under discussion prevents the removal from a state to a federal court on *any ground whatever.*

The opinion of the court in *Hulac* v. *Chicago R. Co.*, 194 Fed., 747, is most enlightening on the reasons moving Congress to enact the Employers' Liability Act and the Safety Appliances Act, and every word of the learned court in that opinion is persuasive as to the reason for extending all statutes of the United States conferring or regulating the right of action for death in the case of railroad employes to actions for the death of seamen as the result of injuries received in the course of their employment.

One paragraph in the opinion is so *apropos* to the special point under consideration that it deserves segregation and the special attention of the court in that connection called to it. It is:

> **"One of the rights which Congress had in mind was the right of the servant to choose the forum in which his action should be litigated."**

Other excerpts from the opinion:

> "The prohibitory clause was added as an amendment in the Senate of the United States

and accepted with very little debate. It is not conceivable that Congress did not understand the full import of the words of the amendment and that no exception was expressed. That Congress did intend to forbid the removal of cases arising under the Employers' Liability Act, upon any ground, appears from the fact that the same Congress, at the following session, again forbade the removal of cases in Section 28 of the Judicial Code, and this was by an amendment immediately following the re-enactment and codification of the law covering the whole subject of the right of removal.

It is a well-recognized fact in judicial history that plaintiffs, in actions brought by employes against railway companies resulting from personal injuries, have quite generally and for many years sought to bring and retain their actions in the state courts, and the fact is well attested by the multitude of applications to remand such cases which have been constantly presented to the federal courts. The expense of trials and appeals in the federal courts have been deterrents, and the variance in the rules of law in such cases as applied in the state and federal courts has been well understood. Congress has recognized by the Employers' Liability Act, as well as by the Safety Appliance Acts, that these rules of law should be made more favorable to the injured servant. The purpose of Congress in the enactment of the Employers' Liability Act was the granting of additional rights to the servant and the removal of existing defenses by the master in actions by injured employes against railway companies. One of the rights which Congress had in mind was the right of the

> servant *to choose the forum* in which his action should be litigated. The amendatory Act of Congress gives concurrent jurisdiction to the courts of the United States, and increases the number of districts in which the plaintiff may sue in the United States courts and while thus enlarging the rights of the plaintiff, and in harmony with the general scope of the act, cuts down the rights of the railway company by forbidding a removal of the case upon any ground."

This and the preceding cases were decided and placed in the reports long before Congress provided by the Jones Act that

> "in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, *and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employes shall be applicable.*"

It is hardly conceivable that Congress was ignorant of Section 6 of the Employers' Liability Act or of the construction that had been put on it by the courts throughout the Union. They did not except from the statute the application of this section to cases of seamen and the inevitable conclusion is it was intended to apply.

It is argued that the repealing clause of Merchant Marine Act says nothing of limited liability, while if Congress intended to affect that provision it would have referred to it specifically. Why, when the system brought into the admiralty law

contains a prohibition of limited liability should further reference be necessary.

Sec. 5 of the Federal Employers' Liability Act, provides:

> "Sec. 5. That any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act shall to that extent be void * * *."

Paraphrased in accordance with the provisions of the Merchant Marine Act this section would read:

> "Sec. 5. That any contract, rule, regulation or device whatsoever the purpose or intent of which shall be to enable any ship owner to exempt itself from any liability created by this Act shall to that extent be void * * *."

Of course, the primary object of this provision was to prevent an employer from contracting with the employee or establishing any rule or regulation himself, which would have the effect of limiting his liability.

But it declares an established policy, to wit: that full indemnity shall be paid for the injury sustained, by all who come within its provisions and prohibits any device whatsoever the purpose or intent of which is to exempt the employer from liability and is in accord with the public policy referred to in Great Western Steam Co. v. Phoenix Insurance Co., supra.

Certainly the Congress never intended to, itself, allow to remain as applicable and controlling a limitation of liability which it prohibited the

parties themselves to create by agreement. Such inconsistency should not be attributed to our highest and most respected law making body. Especially is this true when the effect would be to practically nullify the removal of a distinction between employees differing only in the place of employment, the existence of which distinction has been, for many years, abhorrent to the moral sense and conscience of the country and to humanity and to render nugatory a remedial act which must always be given such construction as will best tend to "prevent the mischief and advance the remedy."

This court has recently had before it in the case of Panama Railroad Co. v. Johnson, 264 U. S., 375, construing Sec. 33 of the Merchants' Marine Act and in a lucid and convincing opinion sustained the power of Congress to enact it.

In the course of the opinion this very suggestive language occurs:

> "Rightly understood the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so. On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules. The election is between alternatives accorded *by the maritime law as modified* and not between that and some non-maritime system." (Italics ours.)

In other words Congress, exercising the power it has always possessed, but has never before used, has brought into the maritime law and made part and

parcel of that system rules which since 1908 have been applicable to railroad employees under Federal jurisdiction.

That these rules are an innovation no one will deny, but their incorporation into the maritime law is no greater innovation nor a more radical change in the existing order than was their original incorporation in the system from which they are taken.

The action of Congress in making these rules a part of the maritime law is merely symbolic of the age in which we live, an additional evidence of advancement in civilization, a recognition by the law making power that the seaman is no longer the slave to whom even the doors of the courts are closed but possesses rights and privileges which he may assert and to which heed must be given.

It is suggested and earnestly urged that repeals by implication are not favored. Counsel is not prepared, nor is it found necessary, to combat this suggestion. Appellee was absolved from any such claim by the learned District Judge who said in his opinion granting the motion to vacate (294 Fed., 686):

> "No question is raised with respect to the validity of the Limited Liability Act, or with the exclusive jurisdiction of Admiralty in any case when such limited liability is involved; but it is contended that the enactment by Congress of the Jones Act, so called (41 Stat. 988), was intended to afford seamen rights which had theretofore been denied."

The ground of the motion to vacate the stay specifically set forth appellee's claim to be that the

Limited Liability Act of 1851 and the amendments thereto and the rules of admiralty adopted in pursuance thereof had no application to the cause of action set forth in the complaint to wit, damages for the death of a seaman as the result of personal injuries sustained in the course of his employment and such is still the view it is desired to urge.

While it is well established that repeals by implication are not favored it is equally well established that, in so far as a subsequent statute is inconsistent with or repugnant to an existing one or the new statute covers the entire field to which it relates or changes a legislative policy theretofore established or qualifies existing law, the subsequent statute will prevail. The Paquete Habana, 175 U.S., 677, and cases cited;

> U. S. v. Yuganovich, 246 U. S., 448;
> Campbell v. Wadsworth, 248 U. S., 169.

A somewhat analogous situation arose in connection with the construction of the Act of 1884 (23 Stat. L., pp. 53, 57), a statute adding to the existing Limited Liability Act.

In the course of the discussion of the effect of this enactment in Richardson v. Harmon, 222 U. S., 96, 103, this court said:

> "No purpose to repeal or qualify any of the terms of the existing liability law is declared, nor is this section declared, in words, to be an amendment of that law. But neither fact is of any marked importance. If the necessary effect be to repeal any part of the former law because of repugnance, that consequence must be declared. So, too, if it be in effect an amendment of the law as it stood, by extending that

law to cases not before within it that effect must be given to it without any unnecessary disturbance of the qualifications or procedure under the former law.

The legislation is in pari materia with the Act of 1851 (9 Stat., L. 635, Chap. 43, Sec. 3), as carried into the Revised Statutes as Secs. 4283 et seq. (U. S. Comp. Statutes, 1901, p. 2943) and must be read in connection with that law; and so read should be given such an effect, not incongruous with that law, so far as consistent with the terms of later legislation. * * * The avowed purpose of the original act was to encourage American investments in ships. * * * The same public policy is declared to be the motive of the Act of which this section is a part."

If the effect of Sec. 33 of the Merchants' Marine Act, also declared to be motivated by the "same public policy" after the changed conditions brought about by the lapse of seventy five years, is to change the law as it stood by *withdrawing* from its operations cases theretofore within its provision "that effect must be given to it, without any unnecessary disturbance of the qualifications or procedure under the former law" as it applies to cases not affected by the new legislation or by a later public policy.

This court in the last case cited (Richardson v. Harmon, supra), in effect, held that the first question in any specific case to be determined was whether the case was one "in respect to which his liability is limited," and that is the question which has been decided adversely to appellant here.

Since 1851 much water has gone over the dam. *Tempora mutantur et nos mutamur in illis.*

The age of the Leviathan has succeeded that of the packet on the sea.

Manpower in all fields of endeavor is no longer a commodity to be traded upon in the marts of the world.

In no particular has our progressive civilization been more marked than in the advanced legislation of the last two or three decades for the betterment of those who labor under conditions which they can not control but must depend upon those in authority to make the surroundings reasonably safe for their protection.

On shore this has been demonstrated by the numerous State Employers' Liability Acts, State Compensation Laws, Labor Laws and in the Second Federal Employees' Liability Act. For the benefit of seamen and in a manner approved by this court, the latter system by virtue of the enactment now under consideration was imported into and made a part of the maritime system (Panama R. R. Co. v. Johnson, *supra*).

If the restriction contended for by the appellant attaches, the sytem is in effect nullified and the great step forward rendered worthless to those intended to be benefited thereby.

On sea as on land the maintenance of the efficiency and morale of the operative is of prime importance.

Bennedict in Bennedict's Admiralty, Fourth Edition at page 149, Section 190, states the proposition as follows:

> "'Ships were originally invented for use, and profit, to plough the seas, not to lie by the walls.' The ship being finished and furnished, her first want is a ship's company to navigate

her. Without their strength, and knowledge, and skill, and intrepidity, she must rot at the wharf, or be hurried to destruction. The ship, that by the agency of the most uncertain, capricious, and powerful elements, moves with a certainty and a security only surpassed by the beauty of her appearance and the grace of her motion, when under the control of a well appointed crew, becomes, in the hands of unpractised landsmen, the victim of the first peril, and their efforts only urge her the sooner to inevitable destruction. The service of the ship's company is, therefore, the maritime service which is entitled to the highest consideration and the greatest favor * * *."

This is also well stated by Judge Partridge in the case of the "Mary Winkleman," 294 Fed., 926, who, after speaking of the benefits to be derived by encouraging persons to engage in the building of ships and navigation, says:

"These considerations must appeal with the utmost cogency to anyone who realizes the extent to which our future depends upon the development of our merchant marine. But, on the other hand, it may pertinently be asked 'What's the ship without the men?' Is it too much to hope, that it will be possible to build up a body of vigorous, rugged, intelligent seamen, in such numbers that American ships can at all times confidently rely upon the best of American crews. Is it not apparent that the very existence of such a corps will be the very highest stimulus to the production and maintenance of American bottoms? But how can we expect such a corps, if the American sailor

"is in a position materially more disadvantageous than that of other American workmen? It is no answer, either, to say that there are already many such; for the very reason that their condition has been greatly ameliorated by humane legislation; but for the additional reason that the numbers of such men should be vastly greater than they are.

"It has become a truism that seamen are the wards of Admiralty—to be jealously guarded from oppression or wrong. This is all right enough; but it does not, and should not, accord with the dignity of a noble profession—in that the American seaman who is to maintain and enlarge our prestige on the sea should not and must not, have any need of wardship. His status should be and must be, defined with precision, so that his calling will be invested with the dignity which it deserves. To that end has pointed the whole trend of modern legislation; and it seems to me that the courts should have it constantly in mind, so as to further and not retard, all progress toward that end.

"Nor is it difficult to find recognition of this in the course and history of legislation with regard to seamen, as well as the general trend of judicial interpretation. If it has lagged behind legislation looking to the betterment of the condition of other American workmen, it is only because it has had a greater way to go, and a heavier load to carry. In fact, the distance between the condition of the seaman of half a century ago and his status today is far greater than the progress which has been made with regard to other workmen—not because the progress has been further forward, but because it started much further back.

"Section 33 of the Merchant Marine Act of 1920 reads as follows:

'Section 33. That section 20 of such act of March 4, 1915, be and is, amended to read as follows: Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply,' etc.

"There are no words here of positive or express repeal of the Limited Liability statutes. But the rule that repeals by implication are not favored, has no application where a right or remedy is created inconsistent with a previous statute. Under the law as it stood at the time of the enactment of Section 33, if an action was brought by an injured seaman, he could not 'maintain' it, if the owner of the vessel saw fit to proceed to limit his liability. By the very provisions of the Admiralty rule, the court must issue an order forbidding him to maintain it. What, then, is the result of a statute giving him the right to 'maintain' an action at common law? Maintain, in this sense, means 'to continue or persevere in or with; to carry on'—Webster's International Dictionary. But clearly, he could not 'persevere with' or 'carry on' his action if he could be stopped by limitation proceedings. Moreover, the statute gives him an 'election.' The limitation of liability statute, on the other hand, gives the election to the owner. The

"effect of Section 33, therefore, is to create a new right absolutely inconsistent with the owner's right to elect to surrender his vessel, and thus limit his liability to her value and earned freight. Otherwise it is this *reductio ad absurdum*: The sailor may 'elect' to maintain his action at law, unless the owner 'elects' to surrender his ship.

"The same result is obtained by approaching the problem from the opposite direction.

1. Limited liability proceedings are of such a character that they merge in themselves all suits and claims. As was said in Metropolitan Redwood Co. v. Dor, 223 U. S., 365; 'The very nature of the proceeding is such that it must be exclusive of any separate suit against an owner on account of the ship. The monition which issues when the vessel has been surrendered, and a stipulation entered into to pay the value into court, requires every person to assert his claim in that case.

2. The limitation of liability proceeding, is, of course, strictly in admiralty.

3. The effect of the proceeding, before the enactment of Section 33, was to compel everyone, including an injured sailor to come into that proceeding in admiralty, and there assert his claim.

4. The effect would be that the injured seaman would not have an 'election' to 'maintain' his claim before a jury.

5. It seems to follow inevitably that Congress, in using the words 'election' and 'maintain' must have intended to give the injured seaman a right to recover his damages against the owner in any event, and not to leave him

"to take his chances with other creditors in the proceeds or value of the ship.

"Nor is there anything novel or unusual in a statute which gives a preference of this kind to those who work for wages. It has its basis in the logic of necessity, and the humane recognition of the fact that quite generally the workman's wages, or indemnity in the event of his injury or death by accident, are necessary to the support of his family. For example, most, if not all of the states exempt at least a portion of his wages from execution for other debts than those incurred for necessities. In the event of the bankruptcy of the employer, or an assignment for the benefit of creditors, a preference is given to the wages of employees. The same preference prevails as to the seaman's wages in Admiralty. Workmen's Compensation Laws have proved so beneficent, both to employer and employee, that scarcely a voice, any more, is raised against them. Illustrations might be multiplied indefinitely. But these are enough to suggest that Congress must have intended, in accordance with the whole trend of modern economic and sociological legislation, to put the case of an injured seaman in a different category from other claims."

We are of course not unaware that the learned Circuit Court of Appeals of the 9th Circuit did not agree with the conclusion reached by Judge Partridge in the "Mary Winkleman" (The Charles Nelson Company v. Curtis, decided Oct. 27th, 1924 and not yet reported) but Judge Partridge's opinion is so apropos to the line of thought we have tried to express that it is incorporated as a part of this memorandum.

Should we be permitted to comment upon the conclusion reached by the Circuit Court of Appeals and the reasons given therefor we must hark back to 1880, years before even a seaman's wages had been exempted from the operation of the Limited Liability Law and consider the Benefactor, 103 U. S., 239.

If the learned Circuit Court had followed Judge Bradley's argument it would have found the outstanding theory of the decision to be that the flexibility of admiralty proceedings is such as to enable courts to so shape their course as to obtain justice between the parties and extends the right to limit the liability after the damages have been assessed by the trial court.

It also decided *in that case* the right to stay, by order, the collection of the decree in any other manner than by the pro rata distribution of the fund standing by stipulation in place of the ship and freight.

It is not an authority either to stay the prosecution of the action now pending or for the proposition that the limited liability act is applicable under the circumstances of the instant case.

At the very outset of this memorandum we said:

> "She did not then and does not now question the right of the District Court to restrain or stay the prosecution of and remove to itself any action *where limited liability is applicable.*"

We do not combat, in the slightest, any conclusion reached by the revered judge who wrote for the court in the Benefactor, supra, but commend to this court the suggestion of the flexibility of admiralty proceedings enabling courts to so shape

their course as to obtain justice between the parties, for such is all we ask and as little as we expect of this court in the instant case.

In this flexibility of proceedings lies the answer to the major part of the brief of appellant.

He enumerates the cases in which the limited liability act has been held to apply and says:

> "These various parties * * * must come into a limitation proceeding to assert their claims although quite obviously they would have no concern with any of the provisions of the Merchant Marine Act."

Of course they have no concern in the Merchant Marine Act and hence they are in no way affected by it but remain just where the Limited Liability Act places them.

On the other hand the representative of the seaman whose death resulted from personal injuries sustained in the course of his employment is vastly concerned.

His action is brought upon a cause of action unknown to the maritime law until almost three quarters of a century after the Limited Liability Act was passed.

The section of the Merchant Marine Act which created this cause of action attached no limitation or qualification to it but made it specifically applicable to seamen only and to them only when death ensued from injury sustained in the course of employment.

Under the Limited Liability Act, as we have seen, the ship owner while liable, without limit for his own negligence, is liable only to the extent of the ship and freight for the negligence or misconduct of the master and crew or as differently expressed "for his own fault, neglect and contracts."

Under the system imported into the maritime law and which appellee invokes, he is liable, without limit, not only for his own negligence, but for the negligence of those to whom he delegates the duties imposed by law upon himself, that is to say: for death resulting in whole or in part from the negligence of any of the officers, agents or employees of the ship-owner or by reason of any defect or insufficiency due to his negligence in the ship's appliances or machinery.

In case of death, "election" is not a part of the provision. The right to "maintain" the action is not subjected to any limitation or qualification whatever.

In concluding this memorandum an excerpt from the dissenting opinion of Mr. Justice McKenna in Sandberg v. McDonald, 248 U. S., 185-201, written many years before the enactment of Section 33 of the Merchant Marine Act, June 5, 1920, is quoted:

> "This section and the others we have quoted express something more than particular relations of ship and seaman,—they express the policy of the United States, which no private conventions, no matter where their locality of execution, can be adduced to contravene. The Kensington, 183 U. S., 263, citing cases. Nor are we called upon to assign the genesis of the policy or trace the evolution of its remedy to the act in controversy; and besides, it has been done elsewhere. It is enough to say that the act itself demonstrates that it is intended as a means in the development of the merchant marine and it hardly needs to be added, to quote counsel for the government, 'that the welfare of the seaman is remarkably interrelated with that of the merchant marine.'"

In view, therefore, of these many incongruities between the old law and the new, of the evident intention of the Congress to keep pace, in Maritime matters, with the trend of the times by bringing into the maritime law rules from a tried and approved system in another and closely allied industry and thus establishing a rule of liability of the ship owner to the seaman which did not exist when the Limited Liability Act was passed, as well as the avowed purpose of both acts to be the betterment of the Merchant Marine, it seems clear that the second question should be answered in the affirmative, modified if necessary, to accord with the qualifications and limitations placed upon the Limited Liability Law by the Merchant Marine Act 1920, Section 33.

POINT II.

The first question should be answered in the negative.

The Federal Judicial Code, Sec. 265, prohibits an injunction to the state court except in bankruptcy cases.

More by common consent than by direct legislation or judicial determination an exception to that rule has been accorded proceedings to limit liability. Whether this is justified it is not necessary to discuss or to determine. If the second question is answered in the affirmative, it follows, as a matter of course, that the first must be answered in the negative.

Respectfully submitted,

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